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Supreme Court of the United States

October Term, 1984

CRISPUS NIX, WARDEN,

Petitioner,

vs.

EMMANUAL CHARLES WHITESIDE,

Respondent.

BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF ALABAMA, ARIZONA, COLORADO, CONNECTICUT, DELAWARE FLORIDA, HAWAII, IDAHO, ILLINOIS, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, OHIO, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA AND WYOMING.

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BRIEF OF AMICI CURIAE ON BEHALF OF PETITIONER CRISPUS NIX ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INTEREST OF THE AMICI CURIAE

The State of Indiana, and the 36 other amici states and commonwealths, through their respective Attorneys General, and the State of Connecticut, by its Chief State's Attorney, offer this brief as amici curiae in support of the petition for a writ of certiorari sought by Crispus Nix, warden of the Iowa State Penitentiary in the above-captioned matter. The amici states all administer criminal justice systems within their jurisdiction which seek to

promote the safety and welfare of their citizens. In the view of the amici states, the decision of the Court of Appeals in the present case, if allowed to stand, will cause substantial and unnecessary confusion among the bench and bar as to the proper conduct of a criminal defense attorney when faced with a client who advises his lawyer that he intends to commit perjury on the stand. Because of the importance of clarifying the role of defense counsel for the administration of criminal justice in their respective jurisdictions, the amici respectfully pray that the petition for certiorari be granted.

STATEMENT OF THE CASE

In this case, the Court of Appeals set aside Emmanual Charles Whiteside's state court conviction on the ground that his attorney violated Whiteside's right to effective assistance of counsel, to due process of law, and to testify on his own behalf, when the attorney successfully convinced his client not to commit perjury on the witness stand. *Whiteside v. Scurr*, 744 F.2d 1323 (8th Cir. 1984).

The background facts may be briefly stated. Whiteside was charged with the stabbing murder of Calvin Love in connection with a drug transaction that occurred in Whiteside's apartment. The defense theory was that the homicide was committed in self defense. Originally, Whiteside had told his attorney that he had not seen a gun on the person of the deceased, but before trial, he advised his lawyer that he was going to testify that he saw something "metallic" in the hands of Love shortly before Whiteside stabbed him. *See Whiteside, supra* at 1326.

In addition to Whiteside's previous statements to counsel, all the other evidence belied defendant's tardy claim. Three other persons were in the room at the time of the homicide, and none reported seeing a gun. A search of the apartment shortly after Love's death did not disclose a weapon. *See State v. Whiteside*, 272 N.W.2d 468, 471 (Iowa 1978).

Convinced that his client was preparing to commit perjury, Whiteside's attorney admonished him that if he persisted, the attorney would advise the court and "probably would be allowed to attempt to impeach that particular testimony." *See* Appendix, *Whiteside v. Scurr*, *supra* at 47.

While the Eighth Circuit accepted the state court's factual finding that Whiteside was proposing to testify falsely, 744 F.2d at 1328, the panel nevertheless held that Whiteside's attorney had impermissibly deprived him of effective assistance of counsel, due process, and the right to testify. The State sought rehearing en banc. By a 5-4 margin, the Eighth Circuit denied en banc consideration. *Whiteside v. Scurr*, No. 83-1015 (order denying rehearing en banc) (8th Cir., Dec. 24, 1984).

The amici states now join the effort of petitioner Crispus Nix, warden of the Iowa State Penitentiary, to obtain a writ of certiorari to review the opinion and judgment of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. IF ALLOWED TO STAND, THE HOLDING OF THE COURT OF APPEALS WILL ESTABLISH A BASIS FOR A HABEAS CORPUS ATTACK FOR ANY PERSON WHO ALLEGES THAT HE OR SHE WAS DISSUADED FROM TESTIFYING FALSELY BY AN ATTORNEY WHO THREATENED TO WITHDRAW AND ADVISE THE COURT OF THE REASON IF HIS CLIENT INSISTED ON LYING TO THE COURT.

In brief separate opinions accompanying the order of the Court of Appeals denying rehearing en banc, two judges attempted to characterize the original panel opinion as limited in scope. For instance, Judge McMillian states that the panel held "only that a lawyer who has a firm factual basis for believing that his or her client is about to commit

perjury because of confidential communications the client made to the lawyer may not disclose the content of those confidential communications to the trier of fact, in the present case the jury." *Whiteside v. Scurr*, No. 83-1015 (order denying rehearing en banc) (8th Cir. Dec. 24, 1984). Slip Op. at 1. *See also* opinion of Judge Lay concurring in denial of rehearing en banc, *id.*, at 10.

The panel opinion, however, is not so easily limited. For instance, the panel states that Whiteside's lawyer "impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation and confidentiality upon appellant's restricted testimony." *Whiteside v. Scurr*, 744 F.2d at 1329. Under this holding of the panel, a lawyer commits constitutional error cognizable in a habeas corpus proceeding if he or she complies with the ABA Model Rule of Professional Conduct 3.3 (1983), which provides:

> (a) a lawyer shall not knowingly:
> fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.

A rule of law that declares that an attorney who complies with ABA Model Rule of Professional Conduct 3.3 in a criminal case commits constitutional error will have serious consequences for the administration of the criminal justice system. The public cannot be expected to place confidence in a judicial system which grants a new trial on the grounds that an attorney, by threatening to comply with state law and the code of ethics, persuaded his client to testify truthfully.

II. THE HOLDING OF THE COURT OF APPEALS WILL DISCOURAGE THE DEVELOPMENT OF LEGAL ETHICS IN THE CONTEXT OF A DIVERSE FEDERAL SYSTEM.

As recognized by the panel opinion, the proper role of an attorney when confronted with a client who is determined to commit perjury is "very controversial." 744 F.2d at 1327. At the far end of the spectrum, Monroe Freedman emphasizes the role of attorney as advocate, even though it includes presenting the Court with false evidence. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966). Other commentators, however, have placed more emphasis on the role of the attorney as an officer of the court. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 Mich. L. Rev. 1485 (1966).

The states have taken differing approaches to the question. In Florida, for instance, the applicable Rule of Professional Responsibility states that the attorney *shall* reveal the intention of his client to commit a crime (perjury) to the court. *See also* ABA Model Rule of Professional Responsibility, DR 4-101(D) (1969). Florida Stat. Ann. Code of Professional Responsibility, D-R 4-101(D)(1) (1980). In Iowa, the State Supreme Court has held that a client who perjures himself acts outside the attorney client privilege and that an attorney may not knowingly allow his or her client to lie to a tribunal. *Committee on Professional Ethics and Conduct v. Crary*, 245 N.W.2d 298 (1976).

Other states, however, appear to have adopted policies more consistent with Professor Freedman. In Alabama, a lawyer is to withdraw from employment if his client insists on committing perjury, but the attorney is not directed to advise the court. In North Carolina, a lawyer is to withdraw "without necessarily revealing his reasons for wishing to withdraw." Alabama Code of Professional Responsibility, DR 7-102(B)(1); North Carolina Code of Professional

Responsibility, DR 7-102(B)(1). In the District of Columbia, the attorney is simply directed to "call upon his client to rectify" the perjury. District of Columbia Code of Professional Responsibility, DR 7-102(B)(1). *See also* ABA Project on Standards for Criminal Justice: The Prosecution and the Defense Function, Proposed Defense Function Standard 4-7.7 (2d ed. 1980) (lawyer may withdraw, but court should not be advised of reason for seeking to do so).

The effect of the holding of the opinion of the Court of Appeals, however, is to sharply limit the range of Rules of Professional Responsibility that the states may adopt. It seems clear that under the Court of Appeal's approach, Florida's rule is constitutionally suspect. In addition, the rules of many states which permissibly allow attorneys to advise a court of perjury of their clients will be subject to serious constitutional challenge if the holding of the Court of Appeals is not reviewed by this Court. *See e.g.*, Connecticut Code of Professional Responsibility, DR 4-101(C)(3); Idaho Code of Professional Responsibility, DR 4-101(C)(3); Louisiana Code of Professional Responsibility, DR 4-101(C)(3); Pennsylvania Code of Professional Responsibility DR 4-101(c)(3); Montana Code of Professional Responsibility DR 4-101(c)(3).

It is respectfully submitted that states in the federal system should not be constrained by the constitutionalization of legal ethics that is embraced in the opinion of the Court of Appeals. It is precisely in areas of controversy and uncertainty that diversity within the federal system should be allowed to flourish. To stay experimentation by the states, as Justice Brandeis noted many years ago, is a "grave responsibility." *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932). *See also* Frankfurter, *The Public and Its Government*, 49-51 (1930). Because the opinion of the Court of Appeals will significantly discourage the experimental process within the federal system, this Court should grant the petition for a writ of certiorari.

III. A FEDERAL COURT SHOULD NOT GRANT A WRIT OF HABEAS CORPUS WITHOUT A SHOWING OF PREJUDICE TO THE DEFENDANT WHERE AN ATTORNEY SUCCESSFULLY PERSUADES A CLIENT NOT TO TESTIFY FALSELY.

The panel opinion in this case presumes that Whiteside was prejudiced when his attorney persuaded him that he should testify truthfully at trial. The Court defends this extraordinary proposition with a citation to *Strickland v. Washington*, U.S., 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), noting that prejudice is presumed where an attorney "actively represented conflicting interests" and that the actual conflict of interest "adversely affected his lawyer's performance." 744 F.2d at 1330.

At the threshold, there is a substantial question whether the limited presumption described in *Strickland* is applicable at all. In order for a conflict of interest to be present in this case, both the attorney and his client must have legally recognized rights that are mutually inconsistent. Since Whiteside does not have a constitutionally protected right to take the stand and commit perjury, he simply does not have a legally cognizable interest sufficient to trigger the limited presumption of prejudice outlined in *Strickland* for some claims of ineffective assistance of counsel. *See United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1984) (no ineffective assistance where lawyer refuses to allow client to take witness stand and commit perjury).

Even if the *Strickland* rule is applicable, there still must be some showing that the actual conflict of interest "adversely affected his lawyer's performance" before the presumption of prejudice is triggered. In this case, however, there is no showing that the alleged conflict adversely affected his lawyer's performance at trial.

Indeed, Whiteside appears to have had the benefit of zealous advocacy. *See* Fagg, J., dissenting from denial of rehearing en banc in *Whiteside, supra*, Slip. Op. at 7.

It is difficult to see how Whiteside would have helped himself if he had taken the stand and committed perjury. Eyewitnesses to the crime did not see a gun, and a police search of the premises did not reveal a weapon. His claim to have seen a gun was not believed by any of the courts who have reviewed the facts of this case, and his perjured testimony simply would not have been believed by the jury.

In the view of the amici, a retrial of a defendant where an attorney's admonitions in a previous trial had no adverse consequence except to prevent the client from committing perjury would be awkward at best and finds no support in the legal precedents of this Court.

CONCLUSION

For the above reasons, it is respectfully submitted that the petition for writ of certiorari should be granted.

Respectfully submitted,

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